IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Civil No. 286

UNITED STATES OF AMERICA

v.

FIVE GAMBLING DEVICES, LABELED IN PART, "MILLS," AND BEARING SERIAL NUMBERS 593221, 578827; 583708, 578831 AND 581162

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court in this cause dismissing the libel of information.

OPINION BELOW

The order of the District Court has not yet been reported. A copy thereof and of the oral opinion of the court is annexed hereto in the Appendix.[1]

[1] The opinion of the District Court for the Southern District of Illinois mentioned in the oral opinion of the District Court in this cause, is reported at 107 F. Supp. 394.

JURISDICTION

The order of the District Court dismissing the libel of information on the ground that "Section 1173, Title 15, United States Code, as applied in this cause, is unconstitutional" was entered November 21, 1952. The jurisdiction of the Supreme Court to review on direct appeal the judgment of a District Court holding an Act of Congress unconstitutional in any civil action to which the United States is a party is conferred by 28 U.S.C. 1252. See also 28 U.S.C. 2101. The applicability of that section to a judgment holding an Act of Congress unconstitutional as applied is established by *Fleming* v. *Rhodes,* 331 U.S. 100.

QUESTION PRESENTED

Whether, in aid of its admitted power to prohibit the shipping of gambling machines in interstate commerce, Congress may require all dealers in such machines to register and report details of the sales, and provide for the forfeiture of machines sold by unregistered dealers, whether or not the dealer sold the machines in interstate commerce.

STATUTE INVOLVED

The Act of January 2, 1951, 64 Stat. 1134 (15 U.S.C. 1171-1177, Supp. V), provides in pertinent part as follows:

That as used in this Act—

(a) The term "gambling device" means—

(1) any so-called "slot machine" or any other machine or mechanical device an es-

sential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device.

* * * * *

Sec. 2. It shall be unlawful knowingly to transport any gambling device to any place outside of such State, the District of Columbia, or possession: Provided, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.

* * * * *

Sec. 3. Upon first engaging in business, and thereafter on or before the 1st day of July of each year, every manufacturer of and dealer in gambling devices shall register with the Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the last day of each month every manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places of business in the district. The monthly record of sales and deliveries of such gambling devices shall show the mark and number identifying each article together with the name and address of the buyer or consignee thereof and the name and address of the carrier. Duplicate bills or invoices, if complete in the foregoing respects, may be used in filing the record of sales and deliveries. For the purposes of this Act, every manufacturer or dealer shall mark and number each gambling device so that it is individually identifiable. In cases of sale, delivery, or shipment of gambling devices in unassembled form, the manufacturer or dealer shall separately mark and number the components of each gambling device with a common mark and number as if it were an assembled gambling device. It shall be unlawful for any manufacturer or dealer to sell, deliver, or ship any gambling device which is not marked and numbered for identification as herein pro-

vided; and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without having registered as required by this section, or without filing monthly the required inventories and records of sales and deliveries.

* * * * *

Sec. 5. It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of title 18 of the United States Code or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18 of the United States Code.

Sec. 6. Whoever violates any of the provisions of sections 2, 3, 4, or 5 of this Act shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Sec. 7. Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this Act shall be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the

proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred under the provisions of this Act, insofar as applicable and not inconsistent with the provisions hereof: *Provided*, That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of gambling devices under this Act by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

* * * * *

STATEMENT

In September 1952, the United States filed, in the District Court for the Middle District of Tennessee, a libel of information under 15 U.S.C. 1177 (Section 7, *supra*), for the forfeiture of the above gambling machines, alleging that they had been sold to the Graymere Country Club in Columbia Tennessee, in violation of 15 U.S.C. 1173 (Section 3, *supra*), by dealers in gambling devices who had failed to register with the Attorney General, as required by 15 U.S.C. 1173 and to make the reports required by that section. The Country Club intervened as claimant and moved to dismiss the libel

on the ground that 15 U.S.C. 1173, as applied to a sale in Tennessee by a citizen of Tennessee, was unconstitutional as in contravention of the reserved powers of the States.

The District Court sustained the motion, holding Section 1173 unconstitutional as applied in this cause. In its oral opinion, the District Court stated:

> * * * It does not appear anywhere at all that these machines were ever shipped in interstate commerce after the passage of the act, and if they had not been shipped in interstate commerce, after the passage of Act, Congress would have no right to legislate against them. As pointed out by Judge Briggle[2] Congress might have a right to proceed against the dealer for selling the machines, but this is not a proceeding of that kind. This is a proceeding against the machines themselves, and it not appearing that there is any interstate commerce connected with the seizure, or that the machines were ever shipped in interstate commerce after the passage of the Act, Congress has no right to make any regulations as to purely intrastate matters. * * *

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[2] The opinion referred to is that of the District Court for the Southern District of Illinois in the case of *United States* v. *178 Gambling Devices*, 107 F. Supp. 394. There the court stated that, while the registration and report provisions of Section 1173 might well be valid, it would not construe the forfeiture provisions of Section 1177 as applying to machines which had never entered interstate commerce since to do so would raise a question of constitutionality. Since the decision there was based on a construction of the statute, the appeal therein is being taken to the Court of Appeals.

> I am of the opinion that the seizure in this case is illegal, that the libel was not justified, and the machines will be ordered returned to the petitioner.

The order entered in this cause, however, held unconstitutional Section 1173 (Section 3, *supra*) the registration and report section, rather than Section 1177 (Section 7, *supra*), the forfeiture section.

The Question Is Substantial

The decision below seriously emasculates the congressional policy of prohibiting the interstate transportation of gambling machines to states where use thereof is forbidden.

The power of Congress to aid state law enforcement by prohibiting the use of the channels of interstate commerce to contravene state policy is established. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 147; *Lottery Case*, 188 U. S. 321.

It is equally well established that, in aid of its power to regulate interstate commerce, Congress may regulate "those activities intrastate which so affect interstate commerce or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate commerce." *Wickard* v. *Filburn*, 317 U. S. 111, 124. See also *United States* v. *Walsh*, 331 U. S. 432; *United States* v. *Frankfort Distilleries*, 324 U. S. 293; *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110; *United States* v. *Darby*, 312 U. S. 100, 117-118.

It was under this well established power that Congress acted in requiring all manufacturers and dealers to register and make the reports required by Section 1173 (Section 3, *supra*). In a report on the bill (H. Rep. No. 2769, 81st Cong., 2d sess., p. 4) it was stated that those favoring the legislation "pointed, particularly, to the existence of nation-wide crime syndicates which are securing a large share of their revenue from the operation of slot machines and other gambling machines." Congress evidently felt that among manufacturers and dealers in machines, interstate and intrastate transactions were so commingled that registration of and reports from all dealers and manufacturers were necessary for any effective regulation of the interstate aspects of the business. Although only interstate shipments are prohibited, effective enforcement of this prohibition depends upon information which will enable all slot machines to be traced, since a dealer may dispose of machines either interstate or intrastate. Information as to intrastate transactions has frequently been required when needed for the effective enforcement or regulation of interstate commerce. *United States* v. *Darby*, 312 U. S. 100, 124; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 42.

Since, therefore, the registration and report provisions were a legitimate exercise of the congressional power to control interstate commerce in gambling devices, the District Court was in error in dismissing the libel for forfeiture. Obviously, if

Congress could impose the registration requirements, it could provide sanctions for noncompliance therewith. One such sanction is the criminal penalty for noncompliance imposed in Section 6, *supra;* another recognized sanction is forfeiture of an article handled in contravention of law. *United States* v. *One Ford Coupe Automobile*, 272 U. S. 317, 329-333; *United States* v. *Stowell*, 133 U. S. 1. The moment the article was sold by an unregistered dealer, it became property used in violation of the Act and under Section 7, *supra*, title immediately passed to the United States. As this Court stated in the *Stowell* case at pp. 16-17:

> By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.

Forfeiture is merely a means of enforcing a duty imposed by Congress. Since, as we have shown, that duty could validly be imposed, the sanction for noncompliance therewith is also valid.

It is submitted that the decision of the District Court in the instant case is erroneous and that the question presented by this appeal is a substantial one which should be settled by the Supreme Court.

Respectfully submitted,

WALTER J. CUMMINGS, JR.,
Solicitor General.

Dated: December 19, 1952.

APPENDIX

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE COLUMBIA DIVISION

Civil No. 286

UNITED STATES OF AMERICA

vs.

FIVE GAMBLING DEVICES

Labeled in part, "Mills", and bearing Serial numbers 593221, 578827, 583708, 578831, and 581162

ORAL OPINION

THE COURT—I agree with Judge Briggle of the United States District Court of the Southern District of Illinois, in his opinion in two libel cases entitled *United States v. 78 Gambling Devices*, and *United States* v. *48 Gambling Devices*. It does not appear anywhere at all that these machines were ever shipped in interstate commerce after the passage of the act, and if they had not been shipped in interstate commerce, after the passage of the act, Congress would have no right to legislate against them. As pointed out by Judge Briggle Congress might have a right to proceed against the dealer for selling the machines, but this is not a proceeding of that kind. This is a proceeding against the machines themselves, and it not appearing that there is any interstate commerce connected with the seizure, or that the machines were ever shipped in interstate commerce after the passage of the act, Congress has no right to make any reg-

ulations as to purely intrastate matters. These machines might very well have been purchased before the passage of the act in question and stored here in the state of Tennessee, and in all probability they were, and shipped after the act in question was passed, to the purchaser at Columbia, Tennessee. Well, that would be an intrastate shipment, and Congress would have no right to legislate relative to that matter.

I am of the opinion that the seizure in this case is illegal, that the libel was not justified, and the machines will be ordered returned to the petitioner.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DIVISION OF TENNESSEE, COLUMBIA DIVISION

No. 286

UNITED STATES OF AMERICA

vs.

FIVE GAMBLING DEVICES

(Libel)

Before the Hon. Elmer D. Davies, Judge of said Court, at Columbia, Tennessee, on November 19, 1952.

APPEARANCES:

James L. Roberts, Asst. U. S. Dist. Atty., for the Government.

Frierson & Queener, for Defendant Graymere Country Club.

THE COURT: Gentlemen, I am ready to pass on the law on this case of United States against Five

Gambling Devices, but it occurs to me, no evidence has been adduced in the case, no stipulation as to what the facts are. Can you stipulate that the facts set out in the answer or the petition are the true facts in this case?

MR. ROBERTS: If your Honor please, I believe that none of the facts set out in the libel were denied, and would be taken as admitted.

THE COURT: The petition sets out certain facts, in the petition. As I understood the facts, these machines were just seized there at the property of the petitioner, the Graymere Club, is that right?

MR. ROBERTS: That's correct.

THE COURT: That's all the evidence the Government would have.

MAJOR FRIERSON: That's all the evidence the Government would have.

THE COURT: The petition and pleadings, though, don't constitute the evidence. If you are willing to stipulate that those are the facts, I am ready to go ahead and pass on it.

MR. ROBERTS: Yes, sir, we will stipulate.

MAJOR FRIERSON: That the facts are as stated in the petition and pleadings.

THE COURT: I agree with Judge Briggle of the United States District Court of the Southern District of Illinois, in his opinion in two libel cases entitled United States against 178 Gambling Devices, and United States against 48 Gambling Devices. It doesn't appear anywhere at all that these machines were ever shipped in interstate commerce after the passage of the act, and if they hadn't been shipped in interstate commerce, after the passage of the act, Congress would have no right to legislate

against them. As pointed out by Judge Briggle Congress might have a right to proceed against the dealer for selling the machines, but this is not a proceeding of that kind. This is a proceeding against the machines themselves, and it not appearing that there is any interstate commerce connected with the seizure, or that the machines were ever shipped in interstate commerce after the passage of the act, Congress has no right to make any regulations as to purely intrastate matters. These machines might very well have been purchased before the passage of the act in question and stored here in the State of Tennessee, and in all probability they were, and shipped after the act in question was passed, to the purchaser at Columbia, Tennessee. Well, that would be an intrastate shipment, and Congress would have no right to legislate relative to that matter.

I am of the opinion that the seizure in this case is illegal; that the libel was not justified, and the machines will be ordered returned to the petitioner.

—— ELMER D. DAVIES,
U. S. District Judge.

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